Supreme Court, U.S.
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OFFICE OF THE CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

Montgomery Blair Sibley,

Petitioner,

vs.

Samuel Anthony Alito, Jr., Stephen G. Breyer, Ruth Bader Ginsburg, Anthony M. Kennedy, John G. Roberts, Jr., Antonin Scalia, David Hackett Souter, John Paul Stevens, Clarence Thomas and Danny Brickell,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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Petition for Writ of Certiorari

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QUESTIONS PRESENTED FOR REVIEW

WHETHER, the Rule of Necessity compels this otherwise disqualified Court to accept this Petition for review and "say what the law is" on the important questions raised herein?

WHETHER, *sua sponte* dismissals and summary affirmances violate the Rules Enabling Act?

WHETHER, the Constitution authorizes a judicially-ordered forfeiture of an Article III actor's office for lack of "good behavior"?

WHETHER, a clerk of this Court is entitled to absolute judicial immunity from suit regardless of the factual allegations against him?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Montgomery Blair Sibley, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered on November 30, 2009.

Review is mandated as the District of Columbia Circuit: (i) has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power, (ii) decided an important question of federal law that has not been, but should be, settled by this Court, and (iii) has decided an important federal question in a way that conflicts with relevant decisions of this Court and other circuit courts.

OPINIONS BELOW

The January 21, 2009, *sua sponte* Memorandum Order of dismissal by the District Court is reprinted in the appendix hereto, *Appendix-2.*

The November 30, 2009, Summary Affirmance by the Circuit Court is reprinted in the appendix hereto, *Appendix-4.*

The January 5, 2010, Order by the Circuit

Court denying rehearing and rehearing *en banc* are reprinted in the appendix hereto, *Appendix-7,8.*

JURISDICTION

The jurisdiction of this Court is invoked under Article III and the Ninth Amendment to the United States Constitution and 28 U.S.C. §1254(1). Jurisdiction of the District Court was invoked pursuant to: (i) the cause of action for forfeiture of office of the Justices of the Supreme Court created by the provisions of Article III and the Ninth and Tenth Amendments of the United States Constitution, and (ii) 28 U.S.C. §1331.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

U.S. Constitution, Article III, §1

The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

U.S. Constitution, Ninth Amendment

The enumeration in the Constitution, of

certain rights, shall not be construed to deny or disparage others retained by the people.

Disqualification of Justice, 28 U.S.C. §455(b)(5)(i)

Any justice . . . shall disqualify himself in any proceeding in which . . . He . . . is a party to the proceeding.

Rules Enabling Act, 28 U.S.C. §2071

The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.

Rules Enabling Act, 28 U.S.C. §2072(b)

Such rules shall not abridge, enlarge or modify any substantive right.

Code of Federal Regulations, §50.15(b)(1)

Representation is not available [by the Attorney General or his designee] to a federal employee whenever: The conduct with regard to which the employee desires representation does not reasonably appear to have been performed within the scope of his employment with the federal government.

STATEMENT OF THE CASE

In 2004, Petitioner first sued the then-Justices of this Court seeking a declaratory decree that they violated his rights when they repeatedly denied certiorari review of matters he brought before them.

When that first suit reached this Court, those Justices denied certiorari in Case No.:05-459 without recusing themselves. Petitioner then filed his second suit seeking against the then-Justices damages claiming that under 28 U.S.C. §455, those Justices were obligated to recuse themselves because they were named defendants in that first action. When the dismissal of that second suit reached this Court it was assigned Case No. 07-6522. On October 29, 2007, seven Defendant/Justices of this Court disqualified themselves from hearing Case No.: 07-6522 resulting in an automatic affirmance for lack of a quorum under 28 U.S.C. §2109. Petitioner timely moved for rehearing which motion was set for conference by this Court for January 4, 2008.

To date, **over two (2) years later**, this Court has **not** ruled upon that motion for rehearing in Case No.: 07-6522. Significantly, in the interim, a Deputy Clerk of this Court – Danny Brickell – refused to submit Petitioner's Emergency Applications for consideration to Chief Justice Roberts and Justice Thomas.

A priori, there exists a range of behavior which is not: (i) "treason", (ii) "bribery", or (iii) "high crimes

and misdemeanors" but that does constitution "misbehavior" sufficient to breach the "good Behavior" requirement of Article III, §1 for holding judicial office.

Upon this reasoning, Petitioner filed on October 10, 2008, the instant suit seeking the forfeiture of the offices of the Justices of this Court for their misbehavior in office in violation of Article III, §1 of the Constitution. Additionally, that suit raised one claim for damages against Deputy Clerk Danny Brickell for his denial of access to court to Petitioner by refusing to file Petitioner's emergency applications to Chief Justice Roberts and Justice Thomas. In particular, the Complaint at ¶59 alleged:

> Defendant Brickell, by wrongfully refusing to submit for consideration Plaintiff's: (i) "Second Emergency Application for a Stay of the Suspension of Applicant from the Practice of Law in Florida by Respondent" to Chief Justice Roberts and (ii) "Emergency Application for a Stay of the Suspension of Applicant by United States District Court for the Southern District of Florida" to Justice Thomas, denied to Plaintiff access to court and his right to petition to government.

On January 5, 2009, Wynne Patrick Kelly, an Assistant United States Attorney, filed his "Notice of Appearance" on behalf of all defendants.

On January 14, 2009, Petitioner made a motion to the district court under C.F.R. §50.15(b)(1) to disqualify the United States Attorney's Office from representing the Defendant Justices. The basis for the motion was that the Defendant Justices were not acting within the "scope of their employment" when deciding Case Number: 05-459. To hold otherwise would mean that breaking the law is within the "scope of employment" of a federal government employee – an absurd notion.

Though the suit was filed on October 20, 2008, it was not until seven days after Petitioner filed the C.F.R. §50.15(b)(1) motion on January 14, 2009, that the District Court entered its *sua sponte*, without-benefit-of-briefing, order holding in sum that: "the removal from office of the justices of the Supreme Court is a political question that is nonjusticiable by this Court. . . . [The deputy clerk] is immune from suit for the performance of these tasks, which are an integral part of the judicial process. . . . Because the Court does not have jurisdiction over either of these claims, plaintiff's complaint is dismissed SUA SPONTE." *Appendix*-2.

Petitioner timely perfected his appeal of the dismissal. On November 30, 2009, the Circuit Court summarily affirmed the dismissal holding in pertinent part:

> Appellant's request for removal of the Justices of the Supreme Court is a political question that is nonjusticiable.

> See *Nixon v. U.S.*, 506 U.S. 224, 233-37 (1993). Finally, appellant's claims for damages against the deputy clerk of the Supreme Court fail, because such clerks enjoy absolute immunity from damages for the performance of tasks that are an integral part of the judicial process. See *Sindram v. Suda*, 986 F.2d 1459 (D.C. Cir. 1993).

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Petitions for rehearing and rehearing *en banc* were denied, *per curiam*, without opinion on January 5, 2010. *Appendix-7,8.*

REASONS FOR GRANTING THE WRIT

There are four compelling reasons for granting this Petition to review the decision of the United States Court of Appeals for the District of Columbia Circuit.

First, the Rule of Necessity as articulated in *United States v. Will,* 449 U.S. 200 (1980) compels this Court to accept this case notwithstanding the prohibition of 28 U.S.C. §455(b)(5)(i). Otherwise, as in *Will*, this significant case will not be heard by this Court. Moreover, given the personal benefit that will accrue to the Justices and of this Court by a denial of review, the appearance of propriety demands that this Court respond to Petitioner's hard-won right to have his matter heard and properly decided.

Second, upon its supervisory power, this Court must finally address the odious and non-authorized procedures of the inferior federal courts which have usurped authority in violation of the Rules Enabling Act by claiming the right to dismiss a matter *sua sponte* or summarily without according a litigant a "meaningful" opportunity to be heard or amend his claims.

Third, the inferior courts here have decided an important question of federal law that has not been, but should be, settled by this Court; to wit, whether the Constitution authorizes a judicially-ordered forfeiture of an Article III actor's office for lack of "good behavior"?

Last, the Circuit Court has decided an important federal question in a way that conflicts with relevant decisions of this Court and other circuit courts, to wit, that a clerk of this Court is entitled to absolute judicial immunity from suit notwithstanding allegations that he, in bad faith, failed to file properly presented pleadings.

I. THE RULE OF NECESSITY PREVENTS THIS COURT FROM DENYING REVIEW BASED UPON 28 U.S.C. §455(B)(5)(I)

Obviously, eight Justices of this Court are parties to this proceeding and 28 U.S.C. §455(b)(5)(i) nominally requires their disqualification.

Yet, as this same Court recognized in *United States v. Will*, 449 U.S. 200, 213 (1980): "We therefore hold that §455 was not intended by Congress to alter the time-honored Rule of Necessity." In *Will*, this Court, expressly recognizing that §455 mandated this Court's disqualification, nevertheless held: "And we would not casually infer that the Legislative and Executive Branches sought by the enactment of §455 to foreclose federal courts from exercising 'the province and duty of the judicial department to say what the law is.' *Marbury v. Madison*, 1 Cranch 137, 177 (1803)." *Will* at 213.

Likewise here, this Court is obligated to "say what the law is" in this matter. This obligation is particularly compelling for the failure to say what the law is raises the very real specter that this Court is

protecting its self interests. Plainly, it is in the self interest of every member of this Court to deny review and thus let stand the inferior courts' decisions which immunizes the Justices of this Court from any consequence for their behavior in Case Number: 05-459.

Moreover, this Court has failed to yet reconcile its disparate treatment of Case Number: 05-459, in which this Court entered its order denying certiorari, with Case Number: 07-6522, where seven Justices of this Court disqualified themselves from considering the Petition in that matter.

As such, to invoke the mandatory affirmance of 28 U.S.C. §2109 raises such an appearance of impropriety as to implicate due process. Indeed, the very purpose of §455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible. *See:* S.Rep. No 93-419, at 5; H.R.Rep. No. 93-1453, at 5. Yet here, to invoke that section creates the very appearance of impropriety that §455(a) seeks to avoid.

Accordingly, this Court must invoke the Rule of Necessity and proceed to a merits determination of this Petition.

II. THE RULES ENABLING ACT PROHIBITS *SUA SPONTE* DISMISSALS AND SUMMARY AFFIRMANCES

The Rules Enabling Act first authorizes the

inferior courts to: "prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title." 28 U.S.C. §2071. In the next breath, that same Act prohibits the creation of Court Rules that: "abridge, enlarge or modify any substantive right." 28 U.S.C. §2071.

Yet there exists in the district and circuit courts "rules and practices" – as detailed in this Petition – that authorize *sua sponte* dismissals and summary affirmances in plain violation of the proscriptions of the Rules Enabling Act. As such, this Court must take review of this Petition under its supervisory authority over the administration of justice in the federal courts. *See, e. g. Nardone v. United States*, 308 U.S. 338, 341-342 (1939).

As for *sua sponte* dismissal by district courts, this Court has never recognized or authorized the exercise of such an anomalous power. More importantly, the Federal Rules of Civil Procedure do not permit the termination of a lawsuit by a *sua sponte* dismissal. Instead, those Rules contemplate motion practice and briefing. *Cf*: FRCP, Rule 12(d)("All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion [to dismiss].")

Finally, as this Court recognized in *Morgan v. United States*, 298 U.S. 468, 481 (1936):

> [T]he officer who makes the findings

> has addressed himself to the evidence, and, upon that evidence, has conscientiously reached the conclusions which he deems it to justify. That duty cannot be performed by one who has not considered evidence or argument. . . . **The one who decides must hear.** (Emphasis added).

By dismissing this matter *sua sponte*, the district court violated the "rules of practice and procedure" and "abridged" a substantive right: determination by a magistrate who "hears" before deciding.

Likewise, the use by the circuit courts of summary affirmances violates the Rules Enabling Act. In the instant case, the Circuit Court cited *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987), a *per curiam* panel decision for the proposition that: "The merits of the parties' positions are so clear as to warrant summary action."

Notably, neither the Federal Rules of Appellate Procedure nor Circuit Court's own Local Rules authorize a summary disposition of an appeal. As such, for that Court to have a non-published, summary affirmance rule both on its face and as applied procedurally violates FRAP Rule 47(a)(1) and substantively violates the Rules Enabling Act.

FRAP Rule 47(a)(1) mandates that the Circuit Court: "after giving appropriate public notice and

opportunity for comment, make and amend rules governing its practice. A generally applicable direction to parties or lawyers regarding practice before a court must be in a local rule rather than an internal operating procedure or standing order." Clearly, there is no "direction to parties or lawyers regarding" the summary affirmance practice" in the Circuit Court's Local Rules. Moreover, there never was "appropriate public notice and opportunity for comment" on the Circuit Court's summary affirmance rule. As such, the practice of invoking a summary affirmance policy violates FRAP Rule 47(a).

Moreover, upon filing a notice of appeal, an appellate is entitled to file a timely brief. FRAP, Rule 28. The Rules Enabling Act prevents this "substantive right" from elimination by the local rules and practices of the Circuit Court.

Accordingly, this Court is obligated to accept review of this Petition under its supervisory authority over the administration of justice in the federal courts to put an end to this odious and unauthorized practice of *sua sponte* dismissals and summary affirmances which deny a litigant a "meaningful" opportunity to be heard or amend his claims to address the basis of a dismissal.

III. THIS COURT MUST DECIDE THE IMPORTANT, NEVER ADDRESSED, QUESTION OF WHETHER THE CONSTITUTION AUTHORIZES A JUDICIALLY-ORDERED FORFEITURE OF AN ARTICLE III ACTOR'S OFFICE FOR LACK OF "GOOD BEHAVIOR"

"The vast extension of discretionary review by the Supreme Court on writ of certiorari contained in the Judges Bill of 1925, 43 Stat. 936, led the Court to promulgate formal rules, and not rely on admonitions in opinions, regarding conditions under which petitions for certiorari would be granted." *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521,531 (1957). Among those conditions, this Court has identified cases in which a Circuit Court has decided an important question of federal law that has not been, but should be, settled by this Court.

This is just such a case.

The mechanism to forfeit a judicial office is clearly established as detailed below in the history of Article III's "good behavior" requirement. Moreover, the intellectually-dishonest manner in which Petitioner's well founded complaint was treated by the District and Circuit Courts is an embarrassment to the notion of due process which this Court cannot countenance by refusing to review. Last, for this Court to refuse to "say what the law is" on this seminal question of the meaning of "good behavior" smacks of self-protection.

The Circuit Court held: "Appellant's request for removal of the Justices of the Supreme Court is a political question that is nonjusticiable. *Nixon vs. U.S.*, 506 U.S. 224, 233-37 (1993)." *Appendix-4.* As an initial matter, Appellant here did not seek "removal" but "forfeiture" of the offices of Defendant Justices. The distinction is important.

Under Article I, §3, "Judgment in cases of impeachment shall not extend further than to removal from office." Thus, the fundamental error of the Circuit Court's decision stems from its apparent misapprehension of the nature of the action filed by Petitioner.

Petitioner was <u>not</u> trying to impeach the Defendant/Justices – that action is contextually committed by Article II, §4 to Congress: "The President, Vice President and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors."

Importantly, that commitment is expressly <u>limited</u> to removal of "civil officers" <u>solely</u> upon the grounds of treason, bribery, or other high crimes and misdemeanors.

Therefore, the citation to *Nixon* by both the District and Circuit Courts was inane. In *Nixon*, this Court addressed the singular issue of whether:

Senate Rule XI, which allows a

> committee of Senators to hear evidence against an individual who has been impeached and to report that evidence to the full Senate, violates the Impeachment Trial Clause, Art. I, § 3, cl. 6. That Clause provides that the "Senate shall have the sole Power to try all Impeachments." But before we reach the merits of such a claim, we must decide whether it is "justiciable," that is, whether it is a claim that may be resolved by the courts. We conclude that it is not.

Id. at 226.

In holding that the claim was not "justiciable", this Court expressly detailed the obligation of the inferior courts to inquire into the particular issue to which the "justiciability" alleges applies. In *Nixon*, this Court held:

> A controversy is nonjusticiable – i.e., involves a political question – where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it. . . .*Baker v. Carr*, 369 U.S. 186, 217 (1962). **But the courts must, in the first instance, interpret the text in question and determine whether**

> **and to what extent the issue is textually committed.** (Emphasis added).

Hence, in order to invoke the "political question" doctrine to conclude that the District Court was not presented a "justiciable" issue, both the District and Circuit Courts were required "in the first instance,[to] interpret the text in question and determine whether and to what extent the issue is textually committed." This, neither court did; instead they both simply cited to the inapposite *Nixon* case to summarily conclude that the issue raised by Petitioner was "a political question that is nonjusticiable." *Accord*: *Baker v. Carr*, 369 U.S. 186, 210-211, 217 (1962), ("[T]he 'political question' label' tends 'to obscure the need for case-by-case inquiry.' The need for such close examination is nevertheless clear from our precedents, which demonstrate that the functional nature of the political question doctrine requires analysis of 'the precise facts and posture of the particular case,' and precludes 'resolution by any semantic cataloguing.'")

Had the inferior courts performed the mandatory exercise of contextual analysis of Petitioner's claim, rather than engaging in "semantic cataloguing", they would have recognized that it was Article III, §1, not Article II, §4, upon which Petitioner traveled.

Plainly, Article II, §4 is an express limitation on the power of Congress to remove "civil officers".

As stated in *Nixon*, "In our constitutional system, impeachment was designed to be the only check on the Judicial Branch by the Legislature." *Id.* at 235. Yet it is axiomatic that:

> [T]he people . . . organized the [United States] government, and assigned to different departments their respective powers. . . . The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. . . . The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Marbury v. Madison, 5 U.S. 137, 176 (1803). Thus, "impeachment" was only allowed in three instances by the People to Congress: (i) Treason, (ii) Bribery and (iii) High Crimes and Misdemeanors. Accordingly, Congress cannot impeach for "misbehavior" by an Article III actor.

Expressly argued by Petitioner – and ignored as inconvenient by the inferior courts – the drafters

of the Constitution fully envisioned resort – and preserved such resort by the Ninth and Tenth Amendments – to the well-established, common law practice in England which allowed a private citizen to sue for forfeiture of a judge's office. "In England, the Crown was obligated (presumably by custom) to lend its sanction to forfeiture cases when a private citizen complained of misbehavior." 4 Matthew Bacon, *A New Abridgment of the Law*, 416 (London, Worrall 3rd Ed. 1768).

As reported by Max Farrand in his *Records of the Federal Convention of 1787* (Yale University Press, 1911)(hereinafter "*Farrand*"), the phase: "high crimes and misdemeanors" had a specific and technical meaning which – after due consideration and debate – was chosen along with "Treason" and "Bribery" to be the sole basis for impeachment of "civil officers" by the House and Senate.

At the Constitutional Convention, George Mason stated in discussing Article II, §4: "Treason as defined in the Constitution will not reach many great and dangerous offenses. . . . Attempts to subvert the Constitution may not be Treason as defined above . . . it is the more necessary to extend the power of impeachment [beyond Treason and Bribery]". *Farrand*, Vol. 2, p. 550. Accordingly, Mason suggested adding the term "maladministration". *Farrand*, Vol. 2, p. 550. However, James Madison objected stating: "so vague a term [as maladministration] will be equivalent to a tenure during the pleasure of the Senate," and "high crimes

and misdemeanors" was thus substituted in its place and thereafter ratified. *Farrand*, Vol. 2, p. 550.

Moreover, three separate generations of legal scholars have concluded that there exists a mechanism to remove a federal judge other than impeachment. First, Rauol Berger in his exhaustive treatment, *Impeachment: The Constitutional Problems* (1973)(hereinafter "*Berger*") devoted 52 pages and 234 footnotes to this issue and its evolution. Upon such analysis, Raoul Berger concluded:

> Although impeachment was chiefly designed to check Executive abuses and oppression, there was no thought of delivering either the President or the Judiciary to the unbounded discretion of Congress. This is attested by the Framers' rejection of the unfettered removal by Address, by their rejection of "maladministration" because that was "so vague" as to leave tenure "at the pleasure of the Senate, and by the substitution of "high crimes and misdemeanors" with knowledge that it had a "limited" and "technical meaning." (Footnotes omitted).

Berger at 123-124.

Second, Burke Shartel, *Federal Judges – Appointment, Supervision and Removal – Some*

Possibilities under the Constitution, 15 J.Am.Jud. Soc.,79, 85 (1931-1932)(hereinafter "*Shartel*") reasoned: "[T]he framers of the constitution did not wish to make the executive and judicial officer of our government completely dependent on congress. They wanted to confer only a limited power of removal, and the desire limitations on the power to impeach had to be explicitly stated."

Last, Professors Prakash and Smith, *How to Remove a Federal Judge*, 116 Yale Law Journal, 72, 82 (2006)(hereinafter "*Prakash and Smith*") reasoned: "The language in Article I relating to removal itself is instructive – it reads as a limitation rather than a grant of power to the Senate: 'Judgement in Cases of Impeachment shall not extend further than to removal from Office . . .'. To read this language as if it provided that 'Judgement in Cases of Impeachment shall be the only means of removing offices' is to take unwarranted liberties.")

Hence, Congress was <u>never</u> granted the authority to remove Article III actors for "misbehavior" as Congress is limited to impeachment <u>only</u> upon a finding of (i) Treason, (ii) Bribery and (iii) High Crimes and Misdemeanors. *Accord*: *Berger*, 137 ("I propose to demonstrate [that as] impeachment for 'high crimes and misdemeanors' did not embrace removal for 'misbehavior' which fell short of 'high crimes and misdemeanors' some other means of removal must be available, unless we attribute to the Framers the Dickensian design of maintaining a "misbehaving" judge in office."); *Shartel*, p. 85 ("If the

framers of the constitution really intended to grant to the houses of congress the exclusive power to remove civil officer of the United States, why did they not use language appropriate to that end?"); *Prakash and Smith*, p. 86 ("Put another way, if good behavior can be determined only via impeachment, some misbehaving judges will not be removable because their misbehavior will not also amount to 'Treason, Bribery, or other high Crimes and Misdemeanors'. In sum, the standard conflation of the Constitution's good-behavior and impeachment provisions, far from being required or even authorized by the text, actually seems quite contrary to the Constitution's text.")

Patrick Henry famously stated:

> Power is the great evil with which we are contending. We have divided power between three branches of government and erected checks and balances to prevent abuse of power. However where is the check on the power of the judiciary? If we fail to check the power of the judiciary, I predict that we will eventually live under judicial tyranny.

Petitioner maintains that the Founding Fathers most certainly set up a "check" upon the power of the judiciary by employing the then well-known, certain-at-the-time legal term-of-art – "good behavior" – with the understanding that established judicial proceedings were available to address

"misbehavior" in office by a federal judge.

In response to this intellectually and historically sound argument which has never been raised in any federal court before, the District and Circuit courts gave Petitioner the "bum's rush" and, with demonstrably intellectually dishonesty for failing to "interpret the text in question", dismissed Petitioner's claims *sua sponte* and summarily without allowing to him a full hearing.

As such, if only to avoid the appearance that the Federal Judiciary does not want to address this prickly problem, this Court must recognize its obligation to settle this important question of federal law that has not been, but should be, settled by this Court: to wit, whether there exists a procedure other than impeachment to end the appointment to office of an Article III actor?

IV. THIS COURT'S CLERK DOES NOT ENJOY ABSOLUTE IMMUNITY FROM SUIT

As to Petitioner's claim against Deputy Clerk Brickell, the Circuit Court held: "Finally, appellant's claims for damages against the deputy clerk of the Supreme Court fail, because such clerks enjoy absolute immunity from damages for the performance of tasks that are an integral part of the judicial process. See *Sindram v. Suda*, 986 F.2d 1459 (D.C. Cir. 1993)." *Appendix-5*. By so doing, the Circuit Court has decided an important federal

question in a way that both conflicts with relevant decisions of this Court and United States courts of appeals on the same important matter.

Clearly, dismissal of an action on the basis of immunity is proper only when the official is absolutely immune and not when his qualified immunity is at issue. *Cf: Imbler v. Pachtman*, 424 U.S. 409, 419, n. 13 (1976)("The procedural difference between the absolute and the qualified immunities is important. An absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity. The fate of an official with qualified immunity depends upon the circumstances and motivations of his actions, as established by the evidence at trial."); *Gomez v. Toledo*, 446 U.S. 635, 640 (1980)("Moreover, this Court has never indicated that qualified immunity is relevant to the existence of the plaintiff's cause of action; instead, we have described it as a defense available to the official in question. . . . Since qualified immunity is a defense, the burden of pleading it rests with the defendant.")

The Fifth Circuit has held: "Absolute immunity from damages actions applies, only in a narrow range of actions, for clerks of court acting in a non-routine manner under command of court decrees or under explicit instructions of a judge." *Williams v. Wood*, 612 F.2d 982, 985 (5th Cir. 1980).

Likewise, the Seventh Circuit has held that the refusal of a clerk to perform the ministerial act of filing a technically correct pleading has been held to

render immunity unavailable to a clerk. *Snyder v. Nolen*, 380 F.3d 279, 287 (7th Cir. 2004)("We have not had the opportunity to address squarely the issue presently before us – whether a clerk's refusal to file a pleading qualifies for absolute immunity in the absence of explicit judicial direction. . . . Mr. Nolen is charged with having breached his duty to perform the ministerial act of accepting technically sufficient papers. . . . Accordingly, we must conclude that, on this record, there is no basis for dismissal of the action on the ground of absolute quasi-judicial immunity.")

Here, the District Court had no factual basis to contradict the notice pleading allegations of the Complaint to conclude that Defendant Deputy Clerk Brickell – in refusing to file Petitioner's applications – was acting upon: "command of court decrees or under explicit instructions of a judge." As such, for the District Court to conclude that absolute immunity from suit applies to authorize a *sua sponte* dismissal was clearly unwarranted and conflicts with relevant decisions of this Court and the Fifth and Seventh Circuit Courts.

CONCLUSION

In support of the Judges Bill of 1925, then Chief Justice Taft promised Congress that certiorari petitions to invoke the discretionary jurisdiction of this Court would be given "the most careful consideration," and that only petitions that were "frivolous" or addressed to principals of law that were

"well settled." would be summarily denied. William Howard Taft, *Three Needed Steps of Progress*, 8 American Bar Association Journal 36 (Jan. 1922).

Here, this Petition is neither "frivolous" nor addressed to "well settled" principals of law. Indeed, both the Rules Enabling Act and Absolute Immunity issues raised by this Petition are far from "well settled".

Moreover, Petitioner's claim set up under the Constitution to seek forfeiture of an Article III actor's office for lack of "good behavior" in that office, is a "first impression" issue which this Court must resolve.

Do we now live, as Patrick Henry feared, under "judicial tyranny"? A denial of this Petition will confirm that in fact we do so live for this Petition raises the heretofore unexamined questions that this Court must address if the Constitution's promise contained in the preamble to "*establish justice*" is to be realized.

Accordingly, this Court must issue a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit in this matter.

MONTGOMERY BLAIR SIBLEY
Petitioner
3700 Massachusetts Ave, N.W.,
Suite #519
Washington, D.C. 20016

CONTENTS OF APPENDIX

OPINIONS BELOW

The January 21, 2009, *sua sponte* Memorandum Order of dismissal by the District Court *Appendix-2*

The November 30, 2009, Summary Affirmance by the Circuit Court *Appendix-4*

The January 5, 2010, Orders by the Circuit Court denying rehearing and rehearing *en banc* *Appendix-7,8*

United States District Court for the
District of Columbia

Montgomery Blair Sibley,

Plaintiff, Case No.:08-1797

vs.

Samuel Anthony Alito, Jr., *et al.*,

Defendants.
_____/

Memorandum Order
(January 16, 2009)

Plaintiff Montgomery Blair Sibley, pro se, sues the nine justices of the Supreme Court, seeking forfeiture of their offices "for their misbehaviour [sic] in office in violation of Article III, §1 of the United States Constitution." Compl. ¶1.a. Plaintiff also asks this Court to enter damages against Danny Brickell, a deputy clerk for the Supreme Court, for "denial to Plaintiff of access to Court." Compl. ¶1.b. Because this Court does not have jurisdiction over either of these claims, plaintiffs complaint is dismissed *sua sponte*.

First, plaintiff asks this Court to remove the justices of the Supreme Court from office. The Constitution commits the issue of removal on impeachment of civil officers of the United States –

including federal judges – to Congress. U.S. Const. art. I, §§2, 3. Therefore, the removal from office of the justices of the Supreme Court is a political question that is nonjusticiable by this Court. See *Nixon v. United States*, 506 U.S. 224 (1993); *Bergen v. Edenfield*, 701 F.2d 906, 908 (11th Cir. 1983) ("Congress has never given a district court the power in a civil action to enjoin an Article III judge from continuing to sit on the bench . . . ."). Because this is not a claim that can be resolved by the courts, it is hereby DISMISSED.

Second, the deputy clerk of the Supreme Court, whom plaintiff sues in his individual capacity for damages, is immune from suit. "[C]lerks, like judges, are immune from damage suits for the performance of tasks that are an integral part of the judicial process." *Sindram v. Suda*, 986 F.2d 1459, 1460 (D.C. Cir. 1993). The actions plaintiff complains of here – refusal to file plaintiffs motions for failure to comply with the Supreme Court's rules – are "part and parcel of the process of adjudicating cases." *Reddy v. O'Connor*, 520 F. Supp. 2d 124,130 (D.D.C. 2007). Mr. Brickell is immune from suit for the performance of these tasks, which are an integral part of the judicial process. See *Reddy*, 520 F. Supp. 2d at 130-31 (holding a Supreme Court clerk immune from suit for rejection of plaintiffs papers for docketing). This claim, too, is therefore DISMISSED.

SO ORDERED.

Richard Leon
United States District Judge

[Do Not Publish]

In The United States Court Of Appeals
For The District Of Columbia Circuit

D. C. Docket No. :1:08-cv-01797-RJL
September Term 2009
Case No.: 09-5069
Filed on November 30, 2009

Montgomery Blair Sibley,

Appellant,

vs.

Samuel Anthony Alito, Jr., *et al.*,

Appellees.
_____/

BEFORE: Ginsburg, Garland, and Kavanaugh, Circuit Judges.

Order

Upon consideration of the motion to recuse, which contains a motion for reconsideration of the court's August 19, 2009, order and a motion to expedite consideration of appellant's motions, and the opposition thereto; the motion filed June 12, 2009, which contains a motion for summary reversal, the opposition thereto, which contains a motion for

summary affirmance, and the reply, it is

ORDERED that the motion to recuse be denied. Appellant has not demonstrated the court's impartiality might reasonably be questioned. See 28 U.S.C. §455. It is

FURTHER ORDERED that the motion to reconsider the court's August 19, 2009, order be denied. Appellant has provided no basis for reconsideration aside from his request for recusal. It is

FURTHER ORDERED that the motion to expedite consideration of appellant's motions be dismissed as moot. It is

FURTHER ORDERED that the motion for summary affirmance be granted and the motion for summary reversal be denied. The merits of the parties' positions are so clear as to warrant summary action. See *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). Appellant's request for removal of the Justices of the Supreme Court is a political question that is nonjusticiable. See *Nixon v. U.S.*, 506 U.S. 224, 233-37 (1993). Finally, appellant's claims for damages against the deputy clerk of the Supreme Court fail, because such clerks enjoy absolute immunity from damages for the performance of tasks that are an integral part of the judicial process. See *Sindram v. Suda*, 986 F.2d 1459 (D.C. Cir. 1993).

Pursuant to D.C. Circuit Rule 36, this disposition will

not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam.

In The United States Court Of Appeals
For The District Of Columbia Circuit

D. C. Docket No. :1:08-cv-01797-RJL
September Term 2009
Case No.: 09-5069
Filed on January 5, 2010

Montgomery Blair Sibley,

Appellant,

vs.

Samuel Anthony Alito, Jr., *et al.*,

Appellees.
_____/

BEFORE: Ginsburg, Garland, and Kavanaugh, Circuit Judges.

Order

Upon consideration of the petition for rehearing, it is

ORDERED that the petition be denied.

Per Curiam.

In The United States Court Of Appeals
For The District Of Columbia Circuit

D. C. Docket No. :1:08-cv-01797-RJL
September Term 2009
Case No.: 09-5069
Filed on January 5, 2010

Montgomery Blair Sibley,

Appellant,

vs.

Samuel Anthony Alito, Jr., *et al.*,

Appellees.
_____/

BEFORE: Sentelle, Chief Judge, and Ginsburg, Henderson, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh, Circuit Judges.

Order

Upon consideration of the petition for rehearing *en banc*, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam.